UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOSE ANTONIO VASQUEZ-VILLANUEVA, Defendant - Appellant.	No. 05-50238 D.C. No. CR-04-02343-JTM Southern District of California, San Diego ORDER

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges.

The memorandum disposition filed on December 12, 2005 is amended as follows. The second paragraph is stricken and replaced with the following two paragraphs:

Vasquez contends that the district court exceeded the statutory maximum term of supervised release because his prior conviction for possession of a controlled substance in violation of California Health and Safety Code § 11377(a) was not an "aggravated felony" under U.S.S.G. § 2L1.2(b)(1)(C). Section 11377(a) is a "wobbler" statute that imposes alternative maximum penalties: transgressors "shall be punished by imprisonment in a county jail for a period of not more than one year or in the

state prison." Vasquez alleges that after he violated his probation, the state court converted his § 11377 felony offense into a misdemeanor by "revoking" probation and imposing a ninety-day sentence in county jail. *See* Cal. Penal Code § 17(b)(1); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1051 (9th Cir. 2004).

The record shows, however, that the state court suspended Vasquez's sentence and "modified" the term of probation so that it terminates upon his completion of additional time in county jail. Although the state court required jail time as a condition of probation, it never subjected Vasquez to a judgment imposing punishment. Consequently, California Penal Code § 17(b)(1) does not render Vasquez's prior conviction a misdemeanor. *Cf. Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 842, 844-45 (9th Cir. 2003) (§ 17(b)(1) inapplicable where "the state court suspended the proceedings and ordered probation for a period of three years, the first 180 days of which were to be spent in county jail"); *United States v. Robinson*, 967 F.2d 287, 292-93 (9th Cir. 1992) (§ 17(b)(1) inapplicable where the state court "suspended the imposition of sentence and placed [defendant] on three years probation, subject to serving the first nine months in jail").

With this amendment, the panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.